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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 75-1605

RICHARD NIXON,

Appellant,

v.

ADMINISTRATOR OF GENERAL SERVICES, *et al.*;
JACK ANDERSON;
THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, *et al.*,
and LILLIAN HELLMAN, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE JACK ANDERSON

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COUNTERSTATEMENT OF CONSTITUTIONAL PROVISIONS INVOLVED

In addition to the provisions quoted by appellant, Article I, Section 7, clause 2 provides:

> Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, . . .

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the legislative power of the United States, exercised by the Congress and the President concurrently as provided in the Constitution, extends to custody and control of the records accumulated by a former President of the United States while in office.

2. Whether access to such records by successor Presidents, by agencies of the executive branch in the lawful conduct of government business and by the public violates any privilege of a former President.

3. Whether a statute taking custody and control of such records for the purpose of public access and education, ongoing government business and preservation for history, while providing to appellant unique, immediate and complete access to the records, is a "trial," punishment or attainder of the former President who accumulated the records.

4. Whether the former President's right to privacy is violated by archival screening and processing of the records, the overwhelming bulk of which are not private or personal, for the purpose of returning private, personal records to the former President.

INTRODUCTION

Appellant Richard M. Nixon appeals from the judgment below upholding the constitutionality of the Presidential Recordings and Materials Preservation Act, Pub. L. No. 93-526, 88 Stat. 1695, 44 U.S.C. §2107 note and §§3315-24 (Supp. IV, 1974) ("the Act"). The Act provides for government custody, control and processing of the tape recordings and papers ("the records") of appellant's tenure as President of the United States, and in particular, for early public disclosure of those of the

records which relate to criminal and abusive activities of appellant and others during that tenure.

Appellant has filed a brief of 178 pages. In his brief appellant, *inter alia,* ignores recent history, impugns the motives of the Congress and his successor, President Ford, in enacting the Act, asserts a prerogative akin to that of a monarch and characterizes the Act as a punishment and hence a bill of attainder. In this brief intervenor-appellee Jack Anderson, a daily newspaper and radio reporter, principally addresses these aspects of appellant's brief, dealing more briefly with appellant's separation of powers and right of privacy arguments.

CHRONOLOGY OF IMPORTANT EVENTS LEADING TO THIS LITIGATION[1]

DATE	EVENT
June 17, 1972	Five men are arrested at Democratic National Committee Headquarters while attempting to repair electronic equipment.
August 30, 1972	The President announces that Dean has conducted and completed an investigation into the Watergate affair. Claims that no one in the White House or employed by the administration was involved.
January 8, 1973	Watergate break-in trial begins.

[1]Excerpted, with minor editing of a few of the items reproduced, from U.S. Dep't of Justice, Watergate Special Prosecution Force, Report 253-64 (Oct. 1975).

DATE	EVENT
January 15 to January 22, 1973	Press reports suggest that Watergate defendants were being paid by unnamed sources—possibly CRP—and that they were promised money and clemency to plead guilty.
March 19, 1973	McCord writes to Judge Sirica alleging that perjury was committed at trial and that defendants were pressured to remain silent.
April 5, 1973	Judge W. Matt Byrne reports a personal meeting with Ehrlichman, where Ehrlichman suggested a possible future assignment for Byrne.
April 17, 1973	The President announces White House staff will appear before the Senate Select Committee, that there have been major new developments in the Watergate investigation, and that real progress has been made toward finding the truth.
April 23, 1973	White House issues a statement denying that the President had any prior knowledge of the Watergate affair.
April 27, 1973	Judge Byrne reads memo at Ellsberg/Russo trial describing Hunt and Liddy break-in of Dr. Fielding's office.

DATE	EVENT
April 30, 1973	Haldeman, Ehrlichman, Dean and Kleindienst resign.
May 7, 1973	A spokesman for the President denies that there were any offers of clemency to anyone connected with the Watergate affair.
May 9, 1973	Egil Krogh resigns; claims full responsibility for the Fielding break-in.
May 11, 1973	Judge Byrne dismisses all criminal charges against Ellsberg and Russo in Pentagon Papers case.
June 25, 1973	Dean tells Senate Select Committee that the President knew of the cover-up as early as September 1972.
June 25, 1973	Dean submits "enemies list" memorandum of August 16, 1971, to Senate Select Committee.
July 7, 1973	The President informs the Senate Select Committee that he will not personally appear before the Committee and that he will not grant the Committee access to Presidential files.
July 16, 1973	Alexander Butterfield informs the Senate Select Committee of the presidential taping system.
July 24, 1973	Ehrlichman tells the Senate Select Committee that the break-in at

DATE	EVENT
	Fielding's office was legal, and that it was undertaken for national security purposes.
July 31, 1973	The *Washington Post* reports that the President did not sign the deed giving his papers to the National Archives, that the deed was not delivered until April 1 of 1970 (nine months after the effective date of the 1969 law prohibiting tax deductions for such gifts) and that the deed was never accepted by the Archives as a formal written document.
October 31, 1973	J. Fred Buzhardt, Special Counsel to the President, informs the Court that two of the subpoenaed tapes do not exist.
November 21, 1973	Buzhardt informs Judge Sirica of an 18-1/2 minute gap on the tape of a June 20, 1972 conversation between the President and Haldeman.
April 16, 1974	Special Prosecutor issues a trial subpoena for 64 White House taped conversations.
April 30, 1974	President submits to House Judiciary Committee and makes public his versions of transcripts of recorded conversations.
July 24, 1974	Supreme Court unanimously upholds Special Prosecutor's tapes

DATE	EVENT
	subpoena for Watergate trial in *United States v. Nixon.*
July 27, 1974	House Judiciary Committee adopts Article I of impeachment resolution charging the President with obstruction of justice.
July 29, 1974	House Judiciary Committee adopts Article II of impeachment resolution charging the President with misuse of powers, violating his oath of office.
July 30, 1974	House Judiciary Committee adopts Article III of impeachment resolution charging the President with failure to comply with House subpoenas.
August 9, 1974	Richard Nixon resigns from office.
September 8, 1974	President Ford pardons Richard Nixon.
	President Ford announces the agreement between Sampson and Nixon giving Nixon ownership and control over access to Nixon Administration papers.
October 17, 1974	Richard Nixon asks the Court to enforce September 7 Nixon-Sampson agreement.
December 19, 1974	President Ford signs S. 4016 into law—the Presidential Recordings and Materials Preservation Act.

STATEMENT

Appellant's 178-page brief winds slowly and ponderously through a constitutional forest like Grimm's lost children who made obstacles and pitfalls disappear by closing their eyes and denying their existence. Its most remarkable conjuring trick is the illusion that appellant left office just like every other President (Br. 4-5)[2] and its rewriting of history, in the manner of the Great Soviet Encyclopedia, to erase two years of crimes and attempted subversion of the Constitution by scoffing reference to the "Watergate affair."[3]

His brief continually refers to "Congress" as singlehandedly interfering with Presidential prerogative, ignoring the fact that the Presidential Recordings and Materials Preservation Act was enacted by the Congress and signed by the President in their concurrent exercise of the legislative power of the United States, as provided in the Constitution, art. I, § 7.

His brief says that "the amount of such documentary material [which he claims] has been estimated at inflated figures as high as 42,000,000 pages" (Br. 25). He has forgotten that this "inflated" estimate was his own.[4] The size of his claim grows and shrinks like Alice—from "42 million documents" in October 1974, down to

> that small percentage of material most intimately connected with appellant's personal and political

[2] "Br." refers to appellant's brief filed herein in January 1977.

[3] Reference to the "Watergate affair" or "Watergate," always within quotation marks, appears at least 19 times, pp. 10, 11, 17, 36, 41, 117 (twice), 118 n.53 (twice), 125, 127, 129 (twice), 131, 132 (twice), 143, 150 and 161 n.71.

[4] Motion [of plaintiff Richard M. Nixon] for a Preliminary Injunction at 3 (filed Oct. 17, 1974), Nixon v. Sampson, 389 F. Supp. 107 (D.D.C. 1975): "While President, Richard Nixon and his staff generated approximately 42 million documents which are commonly referred to as 'presidential materials.' "

> activities while in office—including tape recordings of his conversations and some 200,000 other items personally prepared or reviewed by appellant . . . [which] has always remained segregated . . . and is presently stored in approximately four small areas in the White House . . . .

when he was seeking this Court's review in May 1976 (J.S. 4),[5] and now back up to the tapes plus 23.3 million pages[6] in January 1977 after this Court granted review.

His brief artfully confuses himself—a private citizen since August 9, 1974, when he fled from office in grave danger of prosecution until he was pardoned a month later—with the President of the United States (President Ford when he filed this action, President Carter now), saying that the Act "take[s] from a particular *Chief Executive* the ultimate control over the materials of his office, thereby interfering with the *President's* management choice.[7]

While disclaiming any challenge to the "motives of the legislators" (Br. 129), he refers to a Congress impelled by "public," or "popular," "passions" (Br. 11, 65, 130) and "frenzied public opinion" (Br. 127).

He attempts to foist on this Court as his own motivations for keeping the tapes and papers out of the possession of the government and away from the public

[5] "J.S." refers to appellant's Jurisdictional Statement filed herein on May 3, 1976; "J.S. App." refers to the Appendix to the Jurisdictional Statement.

[6] Br. 25-26: 42 million less 7.3 million in greeting cards and public opinion mail and 11.4 million of records of the executive departments.

[7] Br. 58 (emphasis added). He refers to himself as "the President" on nearly every page of part I of his Brief, pp. 43-129.

eye, a selfless desire to protect the presidency from encroachment on its executive power,[8] a concern for the sensibilities of his family[9] and a regard for the First Amendment rights of past, present and future presidential advisors and "the future political and professional careers of hundreds of individuals."[10]

Argument, however, is no substitute for the record, which relentlessly declares his real motive and interest—to keep the record of his faithless stewardship of the highest office in the gift of his countrymen from ever seeing the light of day; an interest revealed, perhaps inadvertently, only on page 107 of his brief as "his self-interest and the natural wish that history treat him kindly."

Thus appellant's agreement of September 7, 1974, provided that no one would have access to documents for three years except by appellant's permission, and that after three years he could withdraw any documents for "any purpose or use I may deem appropriate"—which would include their destruction (J.A. 40), provided that no one would have access to the tapes for five years except by appellant's permission and provided that at the end of five years "the Administrator of General Services shall destroy such tapes as I may direct" (J.A. 41).[11]

Thus appellant has opposed to the last ditch numerous attempts by committees of the Congress, or pursuant to

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[8]The major portion of his brief—82 pages, 12-16 and 52-130—is devoted to this argument.

[9]Br. 146; a concern not strong enough for him to warn them that he was taping these intimate conversations. J.A. 556.

[10]Br. 21; *see also* Question Presented No. 5 at Br. 4 and Br. 164-173. He presumably means those whose conversations he taped without their knowledge.

[11]Appellant's brief's description of the agreement (Br. 6) quite fails to mention these provisions. "J.A." refers to the two volume joint Appendix filed herein.

court subpoena in litigation, to obtain access to various records (J.A. 213-17; Intervenor Defendant's Evidentiary Submission, Item (3), *see* J.A. 297 (the full text is not reproduced in the Appendix); *Dellums v. Powell*, No. 76-1336 (D.C. Cir. Jan. 28, 1977)).[12] He has even opposed the publication and availability to the general public of portions of the tape recordings which are in the public domain by reason of their introduction as evidence in the criminal trial of his principal lieutenants, *United States v. Mitchell*, Nos. 75-1409, 75-1410 (D.C. Cir. Oct. 26, 1976).

Thus appellant claims as "personal" and "political" the most incriminating material: the "smoking gun" tape of the June 23, 1972, conversation in which he ordered an attempt to obstruct the FBI's investigation of the Watergate burglary (J.A. 522-25).[13] He would suppress memoranda reflecting abuse of the Internal Revenue Service to harass his political "enemies" (J.A. 577-78, 649-54) because disclosure of such matters would have a chilling effect (which appellant appears to regard as undesirable!) on future presidential advisors. He would suppress (without giving any reason) the record of his intention to "get" a distinguished attorney (J.A. 579-80, 585-86) and the record of the initiation of unlawful wiretaps on newspaper and television reporters (J.A. 557). It is for such purposes that he demands "sole discretion to make decisions with regard to the disposi-

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[12]Appellant argued in *Dellums* that the records should not be subject to discovery at all in any civil case. Brief for Appellant [Richard M. Nixon], at 11-26 (filed May 7, 1976).

[13]"It was the public disclosure of this tape which led to the resignation of President Nixon." *United States v. Haldeman*, Nos. 75-1381, 75-1382, 75-1384, 76-1441 (D.C. Cir. Oct. 12, 1976). The court of appeals' statement of "The Facts" in that opinion is reproduced as Appendix A to this brief. The quotation appears at App. A., p. 11 n. 15.

tion of [presidential] materials" (J.A. 565), denies the public's right to prompt disclosure of the records of his and his associates' acts that have been adjudicated as felonies (J.A. 545) and seems to claim a privilege to suppress evidence of wrongdoing—a word he has difficulty understanding (J.A. 552-53).

SUMMARY OF ARGUMENT

1. Appellant's papers and tapes contain the record of the severest constitutional crisis in 100 years, which forced appellant's flight from the Presidency to escape impeachment. The events of the years prior to his resignation led to numerous criminal convictions and nearly to appellant's indictment for obstruction of justice. In the course of these events, appellant engaged in misrepresentation and falsification of the records he now claims. The Act provides for public disclosure of the tapes and papers relevant to these crimes and abuses of office, §104(a)(1). The tremendous public interest in learning all the facts, to guard against a repetition, far outweighs the interests appellant claims support his exclusive control over what will be made public and what will be destroyed.

2. There is no separation of powers issue here. Both the Congress and the President agree that the Act is needed and that no interest of the executive branch is damaged. Appellant's claim of the right to invoke an asserted "presidential" privilege against the President is a claim to control the processes of government that our Constitution does not give a private citizen, even one who once occupied the office of President.

3. The Act is not a Bill of Attainder. To preserve the record of misconduct is not an attempted sanction for misconduct. The Act reaches not merely the papers and tapes produced by appellant, but those of numerous other former government officials. It protects and safe-

guards them against destruction or alteration by anyone and provides for their publication to the world at large—while at the same time specifically protecting the rights of appellant and of any other individual who would be affected by publication. The Act had no punitive intent; it does no more than provide a system for safeguarding property of the nation. It has no punitive effect; on the contrary, appellant is accorded rights to make use of the materials that are accorded to no other person. To deny appellant the power to conceal or destroy portions of the record of his conduct of office—which the Act does—is not a punishment.

4. Appellant, as a public official, gave up a large part of any privacy claim with respect to the records. The culling out of the records by archivists employed by the United States of America is an intrusion so minimal as not to come close to overriding the tremendous public interest in safeguarding and disclosure of the record for the public benefit. The public interest in preventing similar abuses of power in the future likewise overrides the minimal intrusion upon First Amendment rights.

ARGUMENT

I.

THE WATERGATE AFFAIR, APPELLANT'S ROLE IN IT AND HIS TAMPERING WITH THE WATERGATE RECORD AMPLY SUPPORT THE CONSTITUTIONALITY OF THE ACT.

Appellant argues that notwithstanding the numerous legislative expressions of concern for the preservation of the records at issue here for ongoing government needs and for history, the Act "was principally intended by Congress to force public disclosure of documents and recordings related to what has come to be known as the 'Watergate affair' " (Br. 10). He hints that if the Act had implemented only this intent and had "subjected to

permanent government control" only "Watergate" records and those "directly involving the exercise of presidential duties," his separation of powers argument might be seriously weakened (Br. 36, 117-18).[14] But he then turns about and pins his attainder argument to his assertion of a Watergate motive behind the Act, a legislative "allocation of personal blame" to him for it (Br. 16) and a taking of "his" materials (Br. 18, 138, 140) based on a finding that he was not "a wholly reliable custodian" (Br. 136-37).

Accepting appellant's argument at face value as hypothesis, the Act is amply justified on the basis he attacks. The purpose of disclosure of the record of Watergate by itself sustains the constitutionality of the Act, not least against the attainder claim. For there was indeed an articulated need for exercise of government control over the records—still undisclosed—of the role of appellant and his aides in the greatest constitutional crisis in a century, in the face of an agreement providing for appellant's total control and power of destruction and alteration of those records.

The Act lists, as the first of the purposes the Administrator is to serve in administering the Act, §104(a)(1), "the need to provide the public with the full truth, at the earliest reasonable date, of the abuses of governmental power popularly identified under the generic term 'Watergate' " (Br. 4a). Disclosure to the public of the full record of the crimes and other abuses of power committed by the appellant and his confederates (in office and out) while he was President was thus undeniably one of the chief purposes of the Act:

[14] In fact, that is what the Act does; the remainder is to be returned to appellant, §104(a)(7), (Br. 4a).

> Clearly, it is in the public interest to provide general public access to the materials to assure a full and accurate account of 'Watergate' and to *provide a basis for legislation and executive action to prevent future 'Watergates' and clearly it is in the public interest to safeguard the historical record of the Presidency during the last five and one half years.*

H.R. Rep. No. 1507, 93d Cong., 2d Sess. 8 (1974) (emphasis added); *see also* S. Rep. No. 1181, 93d Cong., 2d Sess. 3 (1974). It was viewed as a "critical freedom of information" law, which was intended to carry out Congress' "responsibility to provide every possible opportunity for each citizen to confront the unscreened facts of the past to be better able to adopt the measures and the legislation necessary to stop future Watergates."

120 Cong. Rec. 37905 (1974) (remarks of Rep. McKinney). One Senator stated:

> [T]he public's interest in these tapes is particularly acute. The Watergate scandals represented an unprecedented . . . assault on our political system's most precious commodity—individual freedom. It is therefore important that these tapes be preserved pending their possible use in criminal trials . . . [and] to assure that, at some point in the future, there [will] be a complete understanding of how and why the Watergate tragedies occurred. The tapes no doubt provide the information necessary to that complete understanding.

120 Cong. Rec. 31549-50 (1974) (remarks of Sen. Nelson).

Appellant, while in office, had resisted such disclosure with every means at his command—including falsification and misrepresentation of the record. He falsified the transcripts of certain taped conversations which he released to the public in his own defense on April 30,

1974. *See, e.g.*, House Committee on the Judiciary, *Impeachment of Richard M. Nixon, President of the United States*, H.R. Rep. No. 1305, 93d Cong., 2d Sess. 128-31, 205 (1974); House Committee on the Judiciary, *Comparison of White House and Judiciary Committee Transcripts of Eight Recorded Presidential Conversations*, 93d Cong., 2d Sess. 3-5, 9, 10, 13, 35, 43, 45, 48, 59 (1974) [hereinafter *Comparison*]. He consistently misrepresented what was in the record. For example, on May 22, 1973, he assured the nation that he "took no part in, nor was I aware of, any subsequent [to June 17, 1972] efforts that have been made to cover up Watergate" and that "[*a*]*t no time* did I attempt, or did I authorize others to attempt, *to implicate the CIA in the Watergate matter.*" 9 Weekly Comp. of Pres. Doc. 693, 693 (May 22, 1973) (emphasis added). *Compare* App. A at 11 n.15. Then on September 5, 1973, appellant stated that "there is nothing whatever" in the tapes that would "reflect unfavorably on [his] Watergate position" and that "there is nothing whatever in the tapes that is inconsistent with" the May 22, 1973, statement. 9 Weekly Comp. of Pres. Doc. 1049, 1055 (Sept. 5, 1973). On April 29, 1974, appellant, describing the falsified transcripts he was releasing, declared to the nation: "As far as what the President personally knew and did with regard to Watergate and the coverup is concerned, these materials—together with those already made available—will tell it all." He assured the nation that "everything that is relevant"—relevant "to my knowledge or actions with regard to Watergate"—"is included." Address to the Nation, reprinted in House Committee on the Judiciary, *Statement of Information: Appendix I,*

Presidential Statements on the Watergate Break-In and its investigation, 93d Cong., 2d Sess., 84 (1974).

On May 22, 1974, appellant wrote, in rejecting the House Committee subpoena, for, *inter alia*, the June 23, 1972, tape: "The Committee has the full story of Watergate, insofar as it relates to Presidential knowledge and Presidential actions. Production of these additional conversations would merely prolong the inquiry without yielding significant additional evidence." 10 Weekly Comp. of Pres. Doc. 538, 538 (May 22, 1974). He repeated the statement to the Committee on June 9. 10 Weekly Comp. of Pres. Doc. 592, 593 (June 9, 1974).

His falsifications and misrepresentations were consistent, continuous and are not susceptible of any explanation save that they were part of a preconceived and carefully carried out plan. For example, on February 28, 1973, appellant raised the possibility of clemency for the Watergate burglars with John Dean. House Committee on the Judiciary, *Transcripts of Eight Recorded Presidential Conversations*, 93d Cong., 2d Sess. 40 (1974). On May 22, 1973, however, he assured the nation that "[a]t no time did I authorize *or know about any* offer of executive clemency for the Watergate defendants." 9 Weekly Comp. of Pres. Doc. 693, 697 (May 22, 1973) (emphasis added). Consistently, on April 30, 1974, he deleted the reference to clemency from the transcript he made public of the February 28, 1973, conversation. *Comparison, supra* at 9. Appellant was given the opportunity during his testimony in this action to defend or explain his falsification and misrepresentation of the record for public consumption. He was unable to do so and refused to answer any questions about it (J.A. 579-96).

Appellant was at pains to conceal his involvement in a conspiracy to obstruct justice by wholesale perjury, *see* App. A, *passim; Comparison, supra* at 31 (deletion of appellant's reference to Gordon Strachan stonewalling from transcript of March 13, 1973, conversation). He was at pains to conceal other violations of his trust as President: the perversion of the processes of agencies of government to "ruin" such political enemies as a major newspaper and a distinguished lawyer, *Comparison, supra* at 3-5, 10, 15 *(see,* for the facts, H.R. Rep. No. 1305, *supra* at 141-44); and the burglary of the office of a psychiatrist in an effort to find material to blacken the public image of another "enemy," Daniel Ellsberg, *Comparison, supra* at 59. *See,* for the facts, *United States v. Ehrlichman,* No. 74-1882, (D.C. Cir. May 17, 1976); *United States v. Barker,* No. 74-1883 (D.C. Cir. May 17, 1973).

Thus it is hardly surprising that a Congress which had determined that disclosure of the full record was imperative for the nation's future political health[15] should concern itself with guaranteeing the integrity of that record. *See* the district court's opinion (J.S. App. 18a-59a; Br. 132 n.60); *see also Hearings before the Subcommittee on Printing of the Committee on House Administration on H.R. 16902 and Related Legislation,* 93d Cong., 2d Sess., 32 (1974). As Senator Javits said:

> A unique national emergency has been created, with reference to a particular President's official papers. . . .
>
> * * * *
>
> . . . [Thus] we not only need a law, we need one that is going to be passed now, because certain rights affix to these papers under that [Nixon-Sampson] agreement which, unless we stay the movement of events, may very well fix and prejudice *what we, as a Congress, and with the President's concurrence, as a country,* think ought to be done about these papers.

120 Cong. Rec. 33859 (1974) (emphasis added).

To this appellant's response is to attempt to equate the record of this "long national nightmare"[16] with his successor's anti-inflation exhortations (Br. 118); and to assert the astonishing proposition that the purpose to disclose the record to educate the public and for legislative reform is simply illegitimate—that "[t]he criminal process provides whatever public remedy is appropriate to deal with concerns of this kind" *(id.).*

But the blinders which appellant manages to wear for the 178 pages of his brief will not make the Watergate affair into the WIN program. The Watergate affair—or rather affairs, *see* Watergate Special Prosecution Force, Report, *supra* note 1, at 50-85, 119-33,—resulted in[17]

- the conviction of one former Attorney General (Mitchell) for obstruction of justice and perjury;
- a guilty plea by another former Attorney General (Kleindienst) for failure to testify truthfully to a Senate Committee, reduced from a proposed charge of perjury;
- conviction of appellant's chief assistant (Haldeman) for obstruction of justice and perjury;

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[15] As Senator Cranston said: "The first step towards earning renewed confidence in government is to permit, consistent with the vital security interests of the United States, full and open access to all of the papers and tape recordings of the Nixon Administration. . . ." 120 Cong. Rec. 33873 (1974).

[16] 10 Weekly Comp. of Pres. Doc. 1023, 1024 (Aug. 9, 1974).

[17] *Id.* at 155-66; *see also* 76.

– conviction of appellant's other chief assistant (Ehrlichman) in two different trials, in one for obstruction of justice and making false statements, in another for conspiracy to violate civil rights (by burglary), and again making false statements;

– a guilty plea by appellant's Special Counsel (Colson) to obstruction of justice;

– a guilty plea by one of appellant's counsel (Dean) to obstruction of justice;

– a guilty plea by a White House assistant and Undersecretary of Transportation (Krogh) to conspiracy to violate civil rights (by burglary);

– guilty pleas by three of appellant's 1972 campaign aides (LaRue, Magruder, Porter) to various offenses in the Watergate cover-up;

– convictions of three burglars (Barker, De Diego, Martinez) for conspiracy to violate civil rights (by burglary);

– conviction of the General Counsel of appellant's campaign organization (Liddy) for conspiracy to violate civil rights (by burglary, both of Dr. Fielding's office and the Democratic National Committee) and wiretapping;

– conviction of six burglars, including the security specialist of appellant's 1972 campaign organization (McCord, Gonzales, Sturgis, and Barker, De Diego and Martinez again) of burglary, other offenses in the Watergate burglary and wiretapping;

– guilty pleas by 18 corporate officers and 18 corporations to making illegal campaign contributions;

– a guilty plea by a White House aide (Dent) and a fund-raiser (Gleason) to violations of the Federal Corrupt Practices Act;

– a guilty plea by appellant's personal attorney and a chief campaign fund-raiser (Kalmbach) to various offenses committed in raising funds for appellant's 1972 campaign;

– a guilty plea by a former Governor of Montana (Babcock) to an offense related to contribution of funds for the cover-up;

– a guilty plea by the Finance Chairman of appellant's 1972 campaign organization, a former Secretary of Commerce (Stans) to charges of failure to report, and acceptance of, illegal campaign contributions;

– conviction of a White House aide (Chapin) for lying to a grand jury about "dirty tricks" in appellant's 1972 campaign;

– a guilty plea by a Counsel to the President (appellant) (Morgan) to obstruction of the Internal Revenue Service (falsifying the date on a deed of gift by appellant to obtain a large income tax deduction);

– the naming of appellant as a co-conspirator to obstruct justice in *United States v. Haldeman* (App. A at 4 n.2); and

– the near-indictment of appellant for conspiracy to obstruct justice, postponed first because of constitutional doubts about indictment of a sitting President, then again in order not to delay the trial of Haldeman, Ehrlichman, Mitchell, et al., and finally averted only by the pardon of appellant. Watergate Special Prosecution Force, Report, *supra* note 1, at 119-24, 128-33.

Buckley v. Valeo, 424 U.S. 1 (1976), establishes the overwhelming public interest in disclosure of this record of corruption and abuse of our political institutions, unmatched in our history, for the purpose of promoting

the general health of those institutions. The Court there upheld the Federal Election Campaign Act's compulsory disclosure provisions as justified by the governmental interest in "the 'free functioning of our national institutions,' " 424 U.S. at 66, the need to gather "the data necessary to detect violations," 424 U.S. at 67-68, and as "part of Congress' effort . . . to insure that the voters are fully informed and to achieve through publicity the maximum deterrence to corruption and undue influence possible." 424 U.S. at 76. This Court in *Buckley* approved, as a purpose of legislation, limitation of "the actuality and appearance of corruption" and prevention of the reoccurrence of "such pernicious practices" as "the deeply disturbing examples surfacing after the 1972 election," 424 U.S. at 26-27.

The Act challenged here provides for disclosure of the same collection of abuses for the same salutary reforming purpose. Sec. 104(a)(1), Br. 4a; H.R. Rep. No. 1507, 93d Cong., 2d Sess. 2 (1974); *Buckley v. Valeo*, 424 U.S. at 27 n.28, referring to *Buckley v. Valeo*, 519 F.2d 821, 839-40 and nn. 36-38 (D.C. Cir. 1975); H.R. Rep. No. 1305, 93d Cong., 2d Sess. 1-4 (1974); S. Rep. No. 1181, 93d Cong., 2d Sess. 3, 6 (1974).

II.

THE ACT IS NEITHER INCONSISTENT WITH THE SEPARATION OF POWERS PRINCIPLE NOR DOES IT INTERFERE WITH ANY RECOGNIZABLE PRIVILEGE

A. The short answer to appellant's lengthy disquisition on separation of powers is that there is simply no conflict between the legislative and executive branches and no encroachment by the one on the powers of the other. The Act was passed by the Congress and signed by the President. U.S. Const., art. I, §7. The possible conflict that might exist if there had been a veto and an override is not present here. Moreover, the executive branch, presided over by President Ford, who signed the Act, has vigorously defended it and upheld its consistency with the principle of separation of powers;[18] as still does the executive branch now presided over by President Carter. There is no "usurpation by Congress of the authority to control the operation of the President's Office" as in the Tenure of Office Act, as appellant boldly asserts (Br. 65).

B. There is here, then, no such clash as was presented in *United States v. Nixon*, 418 U.S. 683 (1974)[19] (Br. 67-72), and *Nixon v. Sirica*, 487 F.2d 700 (D.C. Cir. 1973) (Br. 72), between the judicial branch seeking to enforce a subpoena and the incumbent President seeking to resist it; or in *Senate Select Committee on Presidential Campaign Activities v. Nixon*, 498 F.2d 725 (D.C. Cir. 1974), between one house of the Congress seeking to enforce a subpoena and the incumbent President seeking to resist it (Br. 72). Rather, this is an action against the very executive branch for whose powers the appellant here claims the right to speak. Appellant as a private litigant asks this Court to engage in a direct assault on the constitutional authority of its coordinate

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[18] Motion of the Federal Appellees to Affirm at 12-17.

[19] What this Court did in *United States v. Nixon* was of course a great deal more than merely to enforce the Special Prosecutor's subpoena. The Court was knowingly making the subpoenaed presidential tape recordings available to the House of Representatives for its impeachment inquiry, because then President Nixon had pointed this out to the Court in his brief, arguing that for this reason the subpoena should be quashed. Brief for the Respondent, Cross-Petitioner Richard M. Nixon, President of the United States at 13-17, United States v. Nixon, 418 U.S. 683 (1974). This Court rejected the argument and ordered the subpoenaed materials produced. They were produced and turned over to the House of Representatives and appellant resigned.

branches; he asks this Court to disregard "the public position . . . that the executive branch may have taken in the Ford administration or that it may now take in the Carter administration" (Br. 77). He asks this Court to instruct the President how to manage the affairs of the executive branch to achieve the most effective flow of advice to the President *(id.)*.

C. Appellant therefore urges that there exists a "presidential privilege" that is personal to him, which followed him in his flight from office to escape impeachment, and which as a private citizen he may now invoke to prevent the Congress, the President and the people from examining the record of his conduct and misconduct in office. Neither this Court nor any other has ever recognized such a personal privilege. To do so now would not only depart radically from precedent but would clothe a former office holder with an attribute of monarchy that is wholly alien to our constitutional plan. Appellant makes the mistake, against which Justice Jackson warned, of "confounding the permanent executive office with its temporary occupant," *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (concurring opinion); he appears to believe that he carried attributes of "the permanent executive office" with him when he fled as its "temporary occupant."

1. Appellant's essential premise is false. He argues (Br. 84-90) that this personal "presidential" privilege exists apart from and in a higher sphere than mere "executive" privilege. No court has ever so hinted.[20]

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[20]While he was in office, appellant himself consistently defended the privilege protecting presidential communications as "executive privilege." *See* Senate Select Committee on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 727 (D.C. Cir. 1974); Nixon v. Sirica, 487 F.2d 700, 705, 708 (D.C. Cir. 1973). *See also*

[footnote continued]

The privilege, announced in *United States v. Reynolds*, 345 U.S. 1 (1953), is constitutionally based, and the privilege for presidential communications is no higher, no greater than the privilege for any executive branch communications. It is, as appellant admits (Br. 86), and as this Court held in *United States v. Nixon*, 418 U.S. at 705, based on "the valid need for protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties." It is, as appellant also admits, no more than "one species" of executive privilege (Br. 86 n.31). But it is not, as he goes on to assert (Br. 86) *"personal"* (emphasis in original). Appellant equates this high and important governmental privilege with the husband-wife, attorney-client and priest-penitent privileges and makes the ludicrous analogy of the incumbent President to a divorced spouse, a substitute lawyer and a "second priest" (Br. 86-87).

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appellant's Brief in Opposition at 4, 5, 10, 13, *passim* (filed Aug. 7, 1973), In re Grand Jury Subpoena duces Tecum, Misc. No. 47-73 (D.D.C. 1973); Reply Brief at 8, (filed Aug. 17, 1973) *id.*; Brief of Petitioner [Nixon] at 3, 65-71, 77, *passim*, Nixon v. Sirica, 487 F.2d 700 (D.C. Cir. 1973); Reply Brief of Richard M. Nixon, at 9-10, *id.*; Brief of Richard M. Nixon in Opposition to Plaintiffs' Motion for Summary Judgment at i, 50, 56, Senate Select Committee on Presidential Activities v. Nixon, 498 F.2d 725 (D.C. Cir. 1974); Brief for the Respondent, Cross-Petitioner Richard M. Nixon, President of the United States at 15, 19, 51, 56, 57, 60, 61, United States v. Nixon, 418 U.S. 683 (1974). Appellant's first suggestion of a distinction between "presidential" and "executive" privilege appears in his Reply Brief to this Court in United States v. Nixon, at pp. 14-17. The suggestion was advanced in support of the argument that the assertion of this privilege, as opposed to "ordinary" executive privilege, was not even reviewable. The argument was rejected and as we note in section 2, *infra*, the attempted distinction was ignored by this Court. *See also* Senate Select Committee on Presidential Campaign Activities v. Nixon, 498 F.2d at 631 (citing this Court); Nixon v. Sirica, 487 F.2d at 713-716; United States v. Mitchell, 377 F. Supp. 1326, 1329 (D.D.C. 1974); Nader v. Butz, 60 F.R.D. 381, 383, 385 (D.D.C. 1973).

2. There is no such "personal," "presidential" privilege apart from the government's executive privilege. This Court opened its opinion in *United States v. Nixon* by referring to "the President's claims of absolute *executive privilege*. . . ." 418 U.S. at 686. It then pointed out that the district court had "rejected the contention that the Judiciary was without authority to review an assertion of *executive privilege* by the President," and that "the District Court held that the judiciary, not the President, was the final arbiter of a claim of *executive privilege*." 418 U.S. at 689. The court described "the Special Prosecutor's authority to test any claim of *executive privilege* in the courts." 418 U.S. at 695 n.9 (emphasis added throughout). Moreover, this Court's analysis of the claim of privilege in *United States v. Nixon* is the same analysis made of claims of executive privilege advanced in other cases which this court cites, 418 U.S. at 708 n.17, and in *United States v. Reynolds*, 345 U.S. 1 (1953), which this Court relies upon, 418 U.S. at 710-11.

3. The privilege does not belong to the appellant. Unlike the husband-wife, priest-penitent and lawyer-client privileges (*see* Br. 86-87), executive privilege is not personal to an individual. It belongs to the government and is recognized in order to protect continuing interests of the government. *United States v. Reynolds*, 345 U.S. at 7. The privilege derives from "the necessity for protection of the *public interest* in candid, objective . . . opinions in Presidential decisionmaking" and is therefore "fundamental to the operation of Government" *United States v. Nixon*, 418 U.S. at 708 (emphasis added). This Court's citation in *United States v. Nixon* of the standard executive privilege cases recognizes that the privilege "is granted by custom or statute for the benefit of the public, not of executives who may happen to then hold

office." *Kaiser Aluminum & Chem. Corp. v. United States*, 157 F. Supp. 939, 944 (Ct. Cl. 1958) (Reed, J.). As this Court emphasized in *United States v. Nixon*, it is the President in office who has the power and the responsibility to claim executive privilege for presidential communications:

> If *a President* concludes that compliance with a subpoena *would be injurious to the public interest* he may . . . invoke a claim of privilege. . . . Upon receiving a claim of privilege *from the Chief Executive*, it became the further duty of the District Court to treat the subpoenaed material as presumptively privileged. . . .

418 U.S. at 713 (emphasis added). There is no place under our Constitution for any person except the present holder of the office of President to determine by invocation of the privilege, that disclosure "may be injurious to the public interest." [21]

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[21] Appellant so argued while he was still in office. Brief of Richard M. Nixon in Opposition to Plaintiffs' Motion for Summary Judgment at 60, Senate Select Committee on Presidential Campaign Activities v. Nixon, 498 F.2d 725 (D.C. Cir. 1974):

> Discussions of this kind are regarded as privileged . . . since it is the public that is served when those who represent it are able to make important decisions with the wisdom that only open and frank discussion can provide.

Brief for the Respondent, Cross-Petitioner Richard M. Nixon, President of the United States at 53, United States v. Nixon, 418 U.S. 683 (1974):

> Any determination concerning the disclosure of presidential documents, necessarily requires the exercise of the unique discretion and expertise of the Chief Executive, for such a decision involves "considerations of policy, considerations of extreme magnitude, and certainty, entirely incompetent to the examination and decision of a court of justice." Ware v. Hylton, 3 Dall.

[footnote continued]

4. It is obvious that where the invocation of a claim of privilege must be based on important matters of national interest, only the responsible official, not a private citizen who once held the office, can be vested with authority to invoke the privilege. The incumbent is presumed, by virtue of the trust of his office, to consider the national interest only and not his own interest. *See* Justice Reed's holding in *Kaiser*, 157 F. Supp. at 944. A former official is entitled to no such presumption because he is no longer subject to such a duty of trust. Guardianship of the public interest cannot be reposed in a private citizen whose responsibility for the welfare and governance of our nation has ceased—whether honorably, or, as in this case, under the gravest charges of attempted subversion of our system of government.

III.

THE ACT IS NOT A BILL OF ATTAINDER OR A BILL OF PAINS AND PENALTIES

Appellant's bill of attainder claim hobbles on three legs: (1) that the Act is limited to the papers and tapes of his administration, not those of other Presidents, and only to his tapes and papers, not those of other officials (Br. 130-31); (2) that in lodging custody with the Administrator of General Services, the Act carries the "implication" that appellant was "blameworthy" (Br. 132) and therefore has a punitive intent, and (3) that the Act imposes on him the "punishment" of "confiscation,"

(3 U.S.) 199, 260 (1796). Only the President is in a position to determine which communications must be maintained in confidence, for the public interest in this matter is a judgment only the President can make. It involves a complex blend of policy, perspective, and knowledge uniquely within the province of the President and the executive branch.

that *his* "property . . . has plainly been taken" (Br. 140-41).

A. Appellant argued the first of his points to the district court as a denial of equal protection. He now abandons his equal protection claim but adds this point to his bundle of attainder arguments. The district court disposed of the argument by pointing out that appellant's materials "were in a unique status" (J.S. App. 93a), that under his September 7, 1974, agreement there was no assurance that the materials would be preserved as those of other Presidents had been (*id.* at 94a-95a) and suggesting that there was "adequate basis for concluding that Mr. Nixon might not be a wholly reliable custodian of the materials at issue" (*id.* at 96a).

The point has even less weight in support of an attainder argument than it did in support of the abandoned equal protection argument. As this Court has stated, "underinclusiveness" is not "a necessary feature" of a bill of attainder; "[t]he vice of attainder is that the legislature has decided for itself that certain persons possess certain characteristics and are therefore deserving of sanction, not that it has failed to sanction others similarly situated." *United States v. Brown*, 381 U.S. 437, 449 n.23 (1965).

1. That the Act did not immediately provide similar safeguards for materials of other administrations is irrelevant. The most urgent concern was to protect those records in immediate danger of destruction.[22] Legislation

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[22] As the chairman of the House Government Operations Committee noted:

> Under normal circumstances, such legislation would not be necessary. Recent Presidents have all placed their papers in the public domain, so those engaged in historic research may have full access to the materials. The Government Operations Committee has enacted legislation which establishes Presidential libraries to house such papers.

[footnote continued]

"is not to be overthrown because there are other instances to which it might have been applied." *West Coast Hotel Co. v. Parrish,* 300 U.S. 379, 400 (1937) (citations omitted). Reform "may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.... The legislature may select one phase of one field and apply a remedy there, neglecting the others...." *Geduldig v. Aiello,* 417 U.S. 484, 495 (1974), *quoting Williamson v. Lee Optical Co.,* 348 U.S. 483, 489 (1955). The law is not limited to either "attacking every aspect" of the problems pertaining to the materials of every federal official "or not attacking the problem at all." *Dandridge v. Williams,* 397 U.S. 471, 487 (1970).

2. The claim that "the Act does not reach the material maintained by any other public official" who was involved in Watergate (Br. 131) is without basis.[23]

The Presidential libraries law places an obligation upon the Administrator of General Services to negotiate with a former President *not for ownership but over the best means to preserve and protect the papers for the ultimate benefit of the public.* If the letter and spirit of the law, as well as past precedent, had been followed, there would be little need for us to legislate here.

120 Cong. Rec. 37904 (1974) (remarks of Rep. Brooks) (emphasis added).

[23]Appellant's citation to the Legal Adviser's memorandum (Br. 130, n.59) ignores the ensuing controversy over whether former Secretary Kissinger's notes of conversations with foreign leaders are his personal property, are covered by the Act or are government records under 44 U.S.C. §§3101-06, 3301-14. On January 4, 1977, the Archivist of the United States asserted in a letter to Secretary Kissinger the authority and the duty to determine whether the Kissinger notes "are, indeed, personal property or whether some portions of them may be Federal records or Nixon historical materials" covered by the Act. On February 11, 1977, the Archivist wrote again, quoting the opinion of the General Counsel of GSA that:

[footnote continued]

The Act, section 101(a), covers "all original tape recordings of conversations ... recorded *by any officer or employee of the Federal Government* and which—(1) involve former President Richard M. Nixon *or other individuals* who, at the time of the conversation, *were employed by the Federal Government;* ...." (emphasis added). The Act covers all "Presidential historical materials," §101(b)(1), which includes "the files of individual staff members" (Br. 26) including such aides and co-conspirators as Messrs. Haldeman, Ehrlichman, Dean, et al. (J.A. 405); *United States v. Ehrlichman,* No. 74-1882, slip op. at 38 (D.C. Cir. May 17, 1976). The files of all other federal government officials, whether involved in Watergate or not, are government records already within the full control, custody and possession of the government. 44 U.S.C. §§3101-06, 3301-14.[24]

The Archivist of the United States has the authority and responsibility to make an independent determination of the character (federal records, Nixon historical materials or personal papers) of the telephone transcripts and related documents created or received by Former Secretary of State and Assistant to the President for National Security Affairs Henry A. Kissinger during the course of his service in those positions.

The issue is now in litigation. Reporters Committee for Freedom of the Press v. Vance (D.D.C., C.A. No. 77-0220).

[24]Section 3301 of Title 44 defines government records as:

all books, papers, maps, photographs or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data in them.

B. Most of appellant's attainder argument (Br. 131-40) is devoted to his second point, that the Act was based on a determination that appellant was an "unreliable custodian" of the records and that it consequently embodied a finding of guilt for which it imposed punishment.

It is undeniable that the Act affected, by eliminating, a power over the records—power to destroy, power to suppress from public view—which appellant claimed to have by virtue of the September 7, 1974, agreement with GSA. To this extent it might be argued that the Act deprives appellant of something. To this extent, however, it does not single him out. By placing the records in government control, it safeguards them from destruction by anyone. Moreover, while a "bill of attainder is a legislative act which inflicts punishment without a judicial trial," *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 323 (1866),

> [t]he fact that harm is inflicted by governmental authority does not make it punishment. Figuratively speaking all discomforting action may be deemed punishment because it deprives what otherwise would be enjoyed. But there may be reasons other than punitive for such deprivation.

United States v. Lovett, 328 U.S. 303, 324 (1946) (Frankfurter, J., concurring).

The deprivation here is not based on a legislative determination either of guilt or of punishment. It is, rather, a "relevant incident to a regulation of a present situation." *DeVeau v. Braisted*, 363 U.S. 144, 160 (1960).

The Act dealt with the fate of the records of appellant's administration, nothing else. Congress had before it the September 7, 1974, agreement which created the possibility of the concealment, and eventual

destruction, of the most telling evidence of a profound national scandal. The agreement ensured that no one except appellant and those chosen by him would ever have access to the full and undistorted record. Appellant's excerpts from the legislative history show no more than concern about distortion and destruction of that record and how best to preserve the record for the nation's education. *See* Br. 132 n.60; *see also* pp. 14-15 *supra*. The House, the Senate and the President indeed, and properly, had Watergate in mind when they decided to ensure that this record remained intact and in the government's hands. *See* pp. 14-15 *supra*. There is nothing in the Act or its history, and appellant points to nothing, supporting in the remotest way an intent or purpose, however veiled, to penalize appellant for anything he might have done.[25] The Act and its history cry out, rather, with apprehension for the future safety of the record, with provision to ensure that safety and with purpose to open that record to the nation for its beneficent effect on our political system. The people are entitled to know the facts. Exposure of the truth about Watergate is not the equivalent of punishment of those who were involved. This Court has repeatedly emphasized that "informed public opinion is the most potent of all

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[25] As the district court held (J.S. App. 100a-101a):

> There is no evidence presented to us, nor is there any to be found in the legislative record, to indicate that Congress' design was to impose a *penalty* upon *Mr. Nixon*, by depriving him of custody and control of the disposition of the materials at issue, as punishment for alleged *past* wrongdoings. There is, however, ample evidence that Congress cared about *regulating* how the *materials* would be treated in *the future* in order to ensure that such treatment will be consistent with Congressional perceptions of the public interests. (emphasis in original) (footnote omitted).

restraints upon misgovernment." *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936), *quoted with approval in Buckley v. Valeo*, 424 U.S. 1, 67 n.79 (1976) (*see* pp. 21-22 *supra*). As long as the Act was not intended to punish, but "to devise what was felt to be a much needed scheme of regulation," *DeVeau v. Braisted*, 363 U.S. at 160, the statute cannot be characterized as an unlawful attainder. The Act's designation of the Administrator of General Services to be custodian of the records in no way implies any guilt of appellant—or of any other person who created records covered by the Act, or of any other person not designated as custodian. The Administrator has custody of the materials of many Presidents, has the aid of trained archivists, has storage facilities and was therefore the obvious designee.

C. *United States v. Brown*, 381 U.S. 437 (1965), in no way supports a finding of attainder here. *Brown* struck down section 504 of the Labor-Management Reporting and Disclosure Act of 1959 (the Landrum-Griffin Act) which made it a crime, punishable by fine and imprisonment, for a member of the Communist Party to serve as an officer or an employee of a labor union. 381 U.S. 438 n.1. The *Brown* Court took pains to note that, in its view, "[t]he purpose of the statute before us is to purge the governing boards of labor unions of those whom Congress regards as *guilty of subversive acts and associations*. . . ." 381 U.S. at 460 (emphasis added). The Court noted that "[t]he moment §504 was enacted, respondent [a labor union leader] was given the choice of declining a leadership position in his union or incurring criminal liability [*i.e.*, fine or imprisonment]." 381 U.S. at 452. It contrasted section 504 with section 32 of the Banking Act of 1933, which the Court found "incorporates no judgment censuring or condemning any man or group of men." *Id.* at 453-54.

While *Brown* holds that "punishment" in attainder analysis is not limited to "retribution" but also may include "preventive" legislation, a legislative judgment of "guilt" remains an essential element. The punitive effect of the legislation must be, as in *Brown*, related to the judgment—a "*purge* of those whom Congress regards as *guilty*." 381 U.S. at 460 (emphasis added). There is nothing in the Act challenged here or in its legislative history embodying a finding of "guilt" on appellant's part.[26]

Moreover, the *Brown* Court recognized the lack of any rational relationship, other than Congress' *ipse dixit*, between membership in the Communist Party and a propensity to cause political strikes. 381 U.S. at 455-56. The Court referred to such a congressional "suggestion" as a "fallacy." *Id.* at 455. It noted that whether legislation amounts to an attainder would depend on whether "there existed any demonstrable relationship between the characteristics of the person involved and the evil Congress sought to eliminate." *Id.* at 466. Here, contrariwise, as we have spelled out at pp. 13-22 *supra*, there was a "demonstrable relationship" between the record appellant had made concerning the presidential tapes and papers while he was in office and the "evil

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[26] Contrary to appellant's assertion, *Brown* did not hold that "punitive intent" is "*not* an essential element of a bill of attainder" (Br. 139; emphasis in original). It did no more than find that punitive intent, while necessary, could be inferred. As Justice White pointed out in his dissent, the Court concluded that §504 "must be deemed to have been adopted with a punitive purpose." 381 U.S. at 474. *See also* Comment, The Supreme Court's Bill of Attainder Doctrine: A Need For Clarification, 54 Calif. L. Rev. 212, 231 (1966) (criticizing the majority's reading of a punitive rather than regulatory purpose into §504); 30 Alb. L. Rev. 162, 163 (1966) (concluding that the court "found that the underlying motive of §504 was to punish because it was intended to purge Communists from the governing boards of labor unions").

Congress sought to eliminate," *i.e.*, the danger of the destruction of the materials, their concealment forever from public view or their publication in distorted form. *See Cummings v. Missouri*, 71 U.S. at 320.

Thus Congress, consistent with the Bill of Attainder Clause and *Brown*, might indeed have relied on appellant's being an "unreliable custodian" as a basis for enacting legislation to prevent destruction or alteration of the historical and Watergate record. But it did not do so, and appellant's argument (Br. 136-39) that Congress should have passed a statute generally applying to "unreliable custodians" and have the courts decide whether he was one, falls of its own weight.[27]

The focus of the Act is on the safety and the processing of the records, the public disclosure of those related to Watergate to which the public should have prompt access, together with protection of the rights of individuals and with special provisions favoring the appellant, §§102(c), 104(a) (Br. 3a-4a). This is the "object on which the enactment in question was focused," *Flemming v. Nestor*, 363 U.S. 603, 613-14 (1960), not on appellant. Thus, unlike any bill of attainder that has come before the courts, it does not address itself to an individual or a group and visit consequences upon them. The Act, unlike section 504, "incorporates no judgment censuring or condemning any man or group of men." *United States v. Brown*, 381 U.S. at 453-54.

Brown is inapposite here for another reason. In discussing application of the Attainder Clause to preventive legislation, *Brown* cites the traditional purpose of the clause, to prevent the legislative proscription of politically unpopular groups or causes. 381 U.S. at 453, 458-60. *See also United States v. Lovett*, 328 U.S. 303 (1946). Here there is no such purpose or effect. Government control and processing of the records and their prompt publication in no way condemn appellant's associations or his political beliefs.

[27] The argument is based on one aspect of the *Brown* Court's analysis—that while Congress could set rules of general applicability intended to prevent subversives from holding sensitive positions, it could not designate those persons, but had to leave that task to the courts. 381 U.S. at 461.

As the Court held in *Flemming v. Nestor*, 363 U.S. at 617, "only the clearest proof could suffice" to establish that Congress' purpose was punitive rather than regulatory. *See United States v. Brown*, 381 U.S. at 476 (dissenting opinion). Here the proof is clear that there was no punitive intent, that the purpose of the Act was entirely regulatory—to provide for the protection, processing and publication of the records.

D. Another necessary element of a bill of attainder is that the enactment inflict punishment—that is, have a punitive effect. The Act imposes no significant disability of any kind, much less punishment, on appellant. As noted, part B *supra*, it safeguards the records against the whole world.

Whether the Act has a punitive impact within the meaning of the Attainder Clause depends on whether it imposes a significant "disability or restraint" of the kind which has "historically been regarded as punishment" and which serves the "traditional aims of punishment—retribution and deterrence." *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1969) (footnotes omitted). The Act has none of these characteristics.

1. The Act has nothing in common with the traditional forms of deprivation associated with bills of attainder, such as permanent exclusion from a professional occupation or from public office, *Cummings v.*

Missouri, 71 U.S. (4 Wall.) 277 (1866); *Ex Parte Garland*, 71 U.S. (4 Wall.) 333 (1866); denial of compensation for services rendered to the United States, *United States v. Lovett*, 328 U.S. 303 (1946); denial of the right to hold a particular job, *United States v. Brown*, 381 U.S. 437 (1965), or the more drastic measures historically imposed by bills of attainder: death, banishment, imprisonment or exile.

By contrast, here any "restraints" placed on appellant are minimal. Contrary to appellant's assertion (Br. 140), he has not "been deprived for more than two years of ready access to" his materials, nor has he "had taken from him the entire record of this period of his life." As the district court pointed out (J.S. App. 13a n.7), the Act accords appellant an unlimited right to inspect, copy, quote from or use any of the materials in any way he desires. *See* §102(c), Br. 3a. It thus gives appellant an opportunity to reap a substantial financial benefit from any written or oral work produced as a result. The examination of the records of appellant's administration by discreet and trained archivists—albeit archivists "whom he does not know" (Br. 140)—constitutes no sanction or personal disability whatsoever and has nothing in common with the loss of fundamental civil or political rights imposed by every bill of attainder so labelled by this Court. By employing professional archivists whose job it is routinely to screen both private and official documents,[28] the Act guards against any excessive intrusion into appellant's personal affairs. Section 104(a)(5) provides for the Administrator to promulgate regulations protecting "any party's opportu-

[28]Appellant's attacks on the integrity of the government archivists have not produced a scintilla of evidence to support his claim that their objectivity may be open to question.

nity to assert any legally or constitutionally based right or privilege" denying or limiting access to the materials (Br. 4a). Section 104(a)(7) directs that appellant be given "sole custody and use" of those materials "not likely to be related to . . . [Watergate] and . . . not otherwise of general historical significance" *(id.)*.[29]

2. Nor is there here a punishment by "confiscation of property" (Br. 140). Appellant bases his claim to "own" the materials on the separation of powers doctrine (Br. 90-102). He argues that "the right to control access to and disposition of the materials of his office—is rooted in the Constitution itself" (Br. 94). Various "other incidents of common law ownership" are "engrafted" onto this constitutionally based "ownership" (Br. 93). But if appellant's claimed property rights are an appurtenance of office, conferred by the Constitution for high public purposes, then a "taking" of that bundle of rights would not be confiscation of personal property, any more than would be the government's removal of communications equipment from, or the dismantling of a helicopter pad on, a former President's private property when he leaves office and no longer has need of it.

Moreover, the provision in the Act for just compensation in the event that the Act is found to deprive appellant of private property (§105(c), Br. 7a) eliminates any punitive effect that a taking of such private property would have. The purpose of awarding compensation is to make legally whole the one whose property has been

[29]This provision was designed to guarantee that appellant receive permanent and exclusive custody and disclosure rights over various categories of memorabilia "of a purely personal nature such as records from Mr. Nixon's private law practice or [letters from] persons corresponding with his family." 120 Cong. Rec. 37903 (1974) (Rep. Brademas).

taken, and to avoid any punitive impact. When just compensation is paid, the owner stands "in the same position monetarily as he would have occupied if his property had not been taken." *United States v. Reynolds*, 397 U.S. 14, 16 (1970); *accord, United States v. Miller*, 317 U.S. 373-74 (1943).

In any event, there has been no confiscation of property here because the materials at issue never belonged to appellant in the first place. We rely on and incorporate here the argument of appellee Reporters Committee for Freedom of the Press, et al.

In short, the emphasis of the regulatory scheme is not on punishment, but preservation of the records. It provides protection of appellant's interests consistent with that preservative intent. The efforts made to recognize and respect appellant's legitimate interests in the materials, even if not wholly satisfactory to him, are specifically designed to minimize any adverse impact of the Act.[30]

IV.

NO FIRST OR FOURTH AMENDMENT RIGHTS OF APPELLANT ARE AFFECTED BY THE ACT

Appellant opens his privacy and free speech argument with the concession that by "voluntary entry into public life an elected official surrenders certain privacies" that private citizens do not surrender (Br. 141). He ignores,

[30] *See, e.g.*, 120 Cong. Rec. 33875 (1974) (remarks of Sen. Huddleston that the interest of Congress in avoiding further "embarrassment, humiliation or suffering" to appellant underlies the provisions affording "the former President every protection and consideration while at the same time protecting the right of the public to be completely informed about a matter that affects us all so intimately").

however, the recent cases decided by this Court which implement that principle and which defeat his claim.

A. Privacy interests that are inviolate for a private citizen give way when they are claimed by a holder of a public office and clash with a public interest related to that office. *Kelley v. Johnson*, 425 U.S. 238, 244-49 (1976). Appellant, of course, has rights of privacy "with respect to certain basic matters of procreation, marriage and family life," 425 U.S. at 244, *cf. Paul v. Davis*, 424 U.S. 693, 713 (1976). But when he assumed the Presidency, he gave up his absolute rights of privacy as one of "the citizenry at large," *Kelly v. Johnson*, 425 U.S. at 245, and the Act's provision for the use of archivists to cull out and return to him any purely private records is justified, indeed necessary and traditional for a President, even though it would not be justified for a private citizen. In short, the Act and the archival processing it provides "touch" appellant as a former government official with respect to the records of his tenure, *id.*, and he has no "legitimate expectation of privacy" in the "business records" of the conduct of his Presidency, for which he "can assert neither ownership nor possession." *Cf. United States v. Miller*, 425 U.S. 435, 440, 442 (1976).

B. Independent processing of personal files to ensure that privacy is protected, as contemplated by the Act (*see* J.S. App. 24a-25a), was approved by the Court in *Dep't of the Air Force v. Rose*, 425 U.S. 352 (1976). The Court there adopted a balancing test to implement the policy of the Freedom of Information Act "to open public business to public view when no 'clearly unwarranted' invasion of privacy will result," 425 U.S. at 381. The Court noted, in approving *in camera* judicial review

to delete identifying details from files affected with a public interest,

> [t]o be sure, redaction cannot eliminate all risks of identifiability, as any human approximation risks some degree of imperfection, and the consequences of exposure of identity can admittedly be severe. But redaction is a familiar technique in other contexts and exemptions to disclosure under the Act were intended to be practical workable concepts.

425 U.S. at 381-82 (citations omitted). If anything, professional archivists are preferable to busy district judges to process records for the twin purposes of protecting privacy and opening "public business to public view."

C. Appellant's assumption of office likewise reduces his right to First Amendment protection of political activities that are inextricably related to the conduct of such office. The right of free communication guaranteed in public streets and parks may be limited on government facilities, *cf. Greer v. Spock*, 424 U.S. 828, 838 (1976); an army officer must accept a restriction on First Amendment protections in relation to his responsibilities as an officer, *cf. Parker v. Levy*, 417 U.S. 733, 758, 761 (1974), and civilian government employees must accept restrictions on their political rights, *Civil Service Comm'n v. Letter Carriers*, 413 U.S. 548, 556 (1973). As Justice Powell noted in *Greer*, such First Amendment rights "may be circumscribed when necessary to further a sufficiently strong public interest," as long as the infringement "is limited narrowly to the protection of the particular Government interest involved," 424 U.S. at 842, 847 (concurring opinion). Justice Powell no more than echoed the unanimous holding of the Court in *Buckley v. Valeo*, 424 U.S. 1, 25 (1976), that

> [e]ven a " 'significant interference' with protected rights of political association" may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms. (citations omitted).

D. Finally, while citing *Buckley* insofar as the Court there struck expenditure limitations (Br. 166-167), appellant ignores *Buckley's* upholding the constitutionality of campaign contribution and expenditure disclosure provisions, much more analogous to the Act at issue here. As we noted, pp. 21-22 *supra*, *Buckley* approved these sections of the Federal Election Campaign Act despite the recognition that "disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment," 424 U.S. at 64, because the purpose of public education about abuses such as Watergate outweighed any infringement on First Amendment rights.

CONCLUSION

None of appellant's arguments, or all of them together, override the important public interests served by the Act. The Act is constitutional and the judgment below should be affirmed.

Respectfully submitted,

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March 3, 1977

APPENDIX

APPENDIX A

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S. App. D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1381

UNITED STATES OF AMERICA

v.

HARRY R. HALDEMAN, APPELLANT

No. 75-1382

UNITED STATES OF AMERICA

v.

JOHN D. EHRLICHMAN, APPELLANT

No. 75-1384

UNITED STATES OF AMERICA

v.

JOHN N. MITCHELL, APPELLANT

No. 76-1441 *

UNITED STATES OF AMERICA

v.

HARRY R. HALDEMAN and
JOHN D. EHRLICHMAN, APPELLANTS

Appeals from the United States District Court for the District of Columbia

(D.C. Criminal No. 74-110)

Argued January 6, 1976

Decided October 12, 1976

John J. Wilson, with whom *Frank H. Strickler*, *Ross O'Donoghue*, and *George A. Fisher* (at the time the case was argued) were on the brief, for appellant in No. 75-1381. *Messrs. Strickler* and *O'Donoghue* were on the brief for appellant Haldeman in No. 76-1441.

William Snow Frates, with whom *Andrew C. Hall* was on the brief, for appellant in No. 75-1382. *Messrs. Frates* and *Hall* were on the brief for appellant Ehrlichman in No. 76-1441.

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* For the reasons stated in its memorandum opinion, we find that the District Court did not abuse its discretion in denying the motion of appellants Haldeman and Ehrlichman for a new trial. The judgment of the District Court in No. 76-1441 is therefore affirmed.

William G. Hundley, with whom *Plato Cacheris*, *Robert S. Erdahl*, and *Cary Mark Feldman* were on the brief, for appellant in No. 75-1384.

Peter M. Kreindler, Counsel to the Special Prosecutor, with whom *Henry S. Ruth, Jr.*, Special Prosecutor at the time the brief was filed, *Peter F. Rient*, *Kenneth S. Geller*, *Maureen E. Gevlin*, *Jay B. Stephens*, and *Judith A. Denny*, Assistant Special Prosecutors, and *Sidney M. Glazer*, Attorney, Department of Justice, were on the brief, for appellee in Nos. 75-1381, 75-1382, and 75-1384. *Charles F. C. Ruff*, Special Prosecutor, and *Peter M. Kreindler* and *Paul Hoeber*, Special Assistants to the Special Prosecutor, were on the brief for appellee in No. 76-1441.

Before BAZELON, *Chief Judge*, and WRIGHT, MCGOWAN, LEVENTHAL, ROBINSON, and MACKINNON, *Circuit Judges*, sitting *en banc*.

Opinion for the court *per curiam*.

Dissenting opinion filed by *Circuit Judge* MACKINNON.

PER CURIAM [1]: On March 1, 1974 a grand jury in Washington, D.C. returned a 13-count indictment against seven individuals. It charged what amounted to an unprecedented scandal at the highest levels of government, for most of the defendants had held major positions in the Nixon administration. Charged were John N. Mitchell, former Attorney General of the United States and later head of the Committee to Re-elect the President (CRP), President Nixon's campaign organization for the 1972 election; Harry R. Haldeman, former Assistant to the President, serving basically as chief of the White House

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[1] The opinion in this case is issued *per curiam* not because it has received less than full consideration by the court, but because the complexity of the issues raised on appeal made it useful to share the effort required to draft this opinion among the members of the court.

staff; John D. Ehrlichman, once Assistant for Domestic Affairs to the President; Charles W. Colson, former Special Counsel to the President; Robert C. Mardian, earlier an Assistant Attorney General, then an official of CRP; Kenneth W. Parkinson, hired in June of 1972 as CRP's lawyer; and Gordon Strachan, once a staff assistant to Haldeman at the White House.[2] The counts of the indictment embraced conspiracy, 18 U.S.C. § 371 (1970), obstruction of justice, *id.* § 1503, and various instances of false statements made to the Federal Bureau of Investigation (FBI), *id.* § 1001, to the grand jury, *id.* § 1623, and to the Senate Select Committee on Presidential Campaign Activities, *id.* § 1621.[3] J.A. 65-112.

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[2] The grand jury also authorized the Special Prosecutor to name 18 individuals as co-conspirators: Bernard L. Barker, William O. Bittman, John D. Caulfield, John W. Dean, III, Virgilio R. Gonzalez, Sally Harmony, Dorothy Hunt, E. Howard Hunt, Jr., Herbert W. Kalmbach, Fred C. LaRue, G. Gordon Liddy, Jeb S. Magruder, Eugenio R. Martinez, James W. McCord, Jr., Richard M. Nixon, Paul O'Brien, Frank L. Sturgis, and Anthony T. Ulasewicz. J.A. 483. Several of these individuals have been convicted in other cases of various offenses connected with the Watergate incident.

[3] Count 1 charged all defendants with conspiracy to obstruct justice, to make false statements to a government agency, and to defraud the United States by corrupting the operation of the Central Intelligence Agency (CIA), the FBI, and the Department of Justice. It detailed 45 overt acts allegedly committed in furtherance of the conspiracy by one or more co-conspirators. Count 2 charged all but Mardian with the substantive offense of obstruction of justice. Counts 3 through 6 charged Mitchell with making various false statements—one to the FBI, on two occasions to the grand jury, and once before the Select Committee. Counts 7 through 9 charged Haldeman with three instances of making false statements before the Select Committee. Counts 10 through 12 alleged that Ehrlichman had made false statements, once to the FBI and twice before the grand jury. Finally, Count 13 charged Strachan with making a false statement to the grand jury. J.A. 65-112.

Five defendants ultimately went to trial together before Judge Sirica; prior to trial the charges against Colson had been dropped after his guilty plea in another case, and the case against Strachan was severed with the Government's consent due to legal problems stemming from prior grants of use immunity.[4] The jury acquitted Parkinson, found Mardian guilty of conspiracy, the only offense with which he was charged, and convicted Mitchell, Haldeman, and Ehrlichman of both conspiracy and obstruction of justice, as well as all the individual perjury counts submitted.[5] Sentences of imprisonment were imposed,[6] and those convicted have appealed. We deal in the instant appeals only with the convictions of Haldeman, Ehrlichman, and Mitchell.[7] We affirm.

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[4] The charges against Strachen were later dismissed pursuant to FED. R. CRIM. P. 48(a).

[5] *See* note 3 *supra*. Counts 3 and 10, charging Mitchell and Ehrlichman respectively with false statements to FBI agents, had been dismissed by the court at the close of the Government's case.

[6] Mardian received a sentence of 10 months to three years in prison. Mitchell, Haldeman, and Ehrlichman were sentenced to concurrent terms of 20 months to five years on Counts 1 and 2, and to concurrent terms of 10 months to three years on each perjury count on which they were convicted. The perjury sentences were to run consecutive to the sentences for conspiracy and obstruction of justice, making a total of two and a half to eight years in prison for each of these three defendants.

[7] The statement of facts in Part I of this opinion gives a general summary of the evidence against all four individuals. Mardian's appeal, however, was argued separately before this court and is treated in a separate opinion issued today. *United States* v. *Mardian*, No. 75-1383.

I. THE FACTS

Evidence at trial [8] consisted of both direct testimony and actual tape recordings of key conversations of the co-conspirators. It established a wide-ranging conspiracy designed to impede a grand jury investigation into the break-in at the Democratic National Committee (DNC) headquarters in the Watergate Office Building in Washington, D.C., and into other related matters.

A. *The Gemstone Plan*

In the early morning hours of June 17, 1972, roughly four and a half months before the presidential election, police discovered five men inside the DNC offices carrying electronic equipment, cameras, and large sums of cash. These were no ordinary burglars. They were operating as part of a larger CRP intelligence gathering plan code-named Gemstone, and they had been in the DNC offices once before, in late May. Their mission this time was to fix a defective bugging device placed during the prior entry on the telephone of the DNC chairman; these orders had come after high officials at CRP expressed dissatisfaction with the information theretofore produced by the expensive Gemstone.[9] Tr. 2649, 4143-4147, 4519-4521.

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[8] Since none of the three appellants challenges the sufficiency of the evidence to sustain the jury verdict, we summarize here only the major events of the conspiracy. Moreover, it is well settled that on appeal we are to set forth the evidence in the light most favorable to the jury's verdict. *United States* v. *Clayborne*, 166 U.S.App.D.C. 140, 142, 509 F.2d 473, 475 (1974). *See, e.g., Glasser* v. *United States*, 315 U.S. 60, 80 (1942); *United States* v. *DeLoach*, —— U.S.App. D.C. ——, ——-—— & n.2, 530 F.2d 990, 991-992 & n.2 (1975).

[9] The burglars were James McCord, Bernard Barker, Eugenio Martinez, Virgilio Gonzalez, and Frank Sturgis. Tr. 4143. They, along with E. Howard Hunt, Jr. and G. Gordon Liddy, were convicted of burglary, conspiracy, and unlawful endeavor to intercept oral and wire communications. All but

Gemstone was the brainchild of G. Gordon Liddy, CRP's general counsel, who had been hired in late 1971 with the expectation that he would develop plans for gathering political intelligence and for countering demonstrations. Tr. 2625-2628, 4507. That expectation was abundantly fulfilled. Collaborating with E. Howard Hunt, Jr., a former CIA agent whom Liddy knew well from previous ventures undertaken at White House behest,[10] Liddy went to work on his assignment. In two meetings held during January and February 1972 he presented his initial Gemstone plan and budget to Mitchell, at that time Attorney General but even then the functional head of the Nixon re-election effort. These meetings were attended by Jeb Stuart Magruder, Deputy Director of CRP and later an important Government witness, and John W. Dean, III, counsel to the President and eventually the Government's prime witness at trial.[11] At these first meetings Liddy failed to win approval, Mitchell indicating that the original million-dollar budget had to be scaled down.[12] Tr. 2628-2634, 4507-4513. By March 30, however, Liddy had pared his budget to $250,000, and Mitchell had resigned his duties as Attorney General to become head of CRP in title as well as function. On that date, in Key Biscayne, Florida, Magruder obtained Mitchell's approval for Gemstone in a meeting attended

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McCord and Liddy were convicted on pleas of guilty. *See United States* v. *Liddy*, 166 U.S.App.D.C. 95, 509 F.2d 428 (1974).

[10] Tr. 7662-7664. Hunt still maintained an office in the Executive Office Building next door to the White House.

[11] Both Dean and Magruder were convicted of conspiracy on pleas of guilty entered before the instant trial began. Both served prison terms for their roles in the cover-up. Tr. 3330-3331, 4503.

[12] These early proposals included plans to kidnap demonstration leaders and to plant call girls with Democratic officials. Tr. 4117-4120.

only by Mitchell, Magruder, and Fred LaRue, a close personal friend to Mitchell then serving as a top campaign aide.[13] Tr. 3276-3277, 4514-4517, 4638-4639.

Magruder, who had once served on Haldeman's staff, was keeping the White House informed of campaign developments, including Gemstone plans and operations, by regularly transmitting documents and information on to Strachan, Haldeman's assistant. Tr. 4511-4513, 4518, 6612-6613. Haldeman himself had learned directly about an early version of the Liddy plan when Dean reported to him shortly after the February meeting. Tr. 2635-2636.

B. *The Early Stages of the Conspiracy*

The five burglars arrested inside the DNC gave aliases to the D.C. police, but within hours of the break-in Liddy, who had been monitoring the operation from a safe vantage point in a nearby building, reported the capture to CRP's highest officials, then in California. He told them that one of the captured burglars was James McCord, on CRP's payroll as chief of security. In an apparent effort to avoid the apperance of any link between CRP and the burglars, Mitchell, Mardian, LaRue, and Magruder met and decided to contact the new Attorney General, Richard Kleindienst, urging him to have McCord released from jail before the police penetrated his alias. Mardian placed the call, but ultimately sent Liddy to find the Attorney General when Kleindienst could not be reached directly. Tr. 4530-4536, 6563-6565. This fitful effort foundered, however, on Kleindienst's insistence that the burglars receive no special treatment. If Mitchell wanted to talk to him about it, Kleindienst said, Mitchell should contact him directly. Tr. 5898-5909.

[13] LaRue, like Dean and Magruder, became an important Government witness. He too entered a plea of guilty to conspiracy and was awaiting sentencing at the time of this trial. Tr. 6733-6734, 6743-6746.

Aware that McCord's true identity would come to light. Mardian, Magruder, and LaRue the next day worked on a press release that would deny any CRP tie to the break-in. Tr. 4537-4540, 6565-6569. It suggested instead that McCord might have been working for clients of his private security firm. Haldeman, contacted by long-distance telephone, approved the statement and urged that the release issue as soon as possible, even though Magruder had already informed him that the break-in was "Liddy's operation." Tr. 4542-4544. The release appeared on June 18 under Mitchell's name and with his approval. J.A. 912.

Meanwhile, in Washington, White House and CRP files were being cleansed of sensitive materials relating to Gemstone. Strachan performed this function at the White House, under orders from Haldeman to remove anything embarrassing. Among the items destroyed were DNC wiretap reports and a memorandum from Haldeman to Magruder urging that the intelligence operation shift from Senator Muskie to Senator McGovern, the emerging Democratic front-runner. Tr. 2651-2653, 4547-4548. Magruder immediately ordered removal of all Gemstone materials from the files at CRP; he took them to his home upon his return from California on June 19. At a meeting that night, attended by Mitchell, Magruder, LaRue, Dean, and possibly Mardian,[14] Magruder asked Mitchell what to do with the papers. Mitchell suggested that he "have a fire," and he did—destroying the Gemstone documents in his home fireplace. Tr. 4540-4550, 4823, 6570-6573.

Dean met with Liddy on June 19 and received a full briefing on the background of the break-in. He then

[14] Mardian did attend the meeting, but he left early. Most witnesses could not recall whether he was present when the Gemstone documents were discussed. Tr. 2673, 5215, 6572-6573.

imparted his own substantial knowledge to Ehrlichman, detailing the roles of Hunt and Liddy and mentioning the pledge he had received from Liddy that Liddy would keep silent. Tr. 2648-2656. There was no similar assurance regarding Hunt; Ehrlichman consequently issued, then retracted, an order that Hunt leave the country. Tr. 2657-2660, 4192-4193. He also directed that Hunt's safe, in his office in the Executive Office Building, be opened. Tr. 2660-2661. Dean retrieved the materials from the safe (which included some electronic equipment related to Watergate along with documents related to other questionable activities), whereupon Ehrlichman suggested to Dean that he shred some and "deep six" the rest. Dean refused, fearing that too many people—White House employees and Secret Service agents—knew he had removed materials from the safe. Tr. 2679-2687. Ultimately the items were turned over to the FBI, although the most sensitive went directly to L. Patrick Gray, the Acting Director, with directions from Dean and Ehrlichman that they should never see the light of day. Gray complied. Tr. 6212-6217.

It was becoming increasingly clear that the grand jury investigation would eventually tie Liddy and Hunt to the break-in scheme, primarily by tracing the currency that had been found on the burglars.[15] Tr. 2696-2708,

[15] The conspirators were able to stall the FBI's tracing of the money for about two weeks by invoking the danger of trespassing on secret CIA projects. The FBI had already traced the funds to two individuals who apparently served as CRP intermediaries in the "laundering" of certain contributions from former Democratic Party supporters. Tr. 2696-2710, 6170-6175. One of the intermediaries was a Mexican citizen. The Bureau was ready to interview these individuals. but was deterred when General Walters, Deputy Director of the CIA, told Gray on June 23 that such interviews might uncover CIA operations in Mexico. Walters was acting on direct orders from Haldeman, delivered during a meeting participated in by Ehrlichman. (CIA Director Helms had also been at the meeting, insisting all along that there was no danger to CIA operations. Both Haldeman and Ehrlichman, moreover, knew at the time that the break-in was Liddy's operation.) Tr. 6123-6130, 6202-6204. Haldeman, in turn, had acted only after receiving approval for this course from President Nixon in a key meeting earlier that same day, June 23. He had told Nixon that both Dean and Mitchell suggested use of the CIA to contain the FBI investigation. Nixon agreed. Govt. Ex. 1 (a tape recording of the actual Nixon-Haldeman conversation), Tape Tr. 2-7. It was the public disclosure of this tape which led to the resignation of President Nixon.

6605-6608. This presented added problems, as the links to CRP and the White House became more apparent. The conspirators decided to cover higher involvement by plac-

By July 5 Gray had grown increasingly uneasy. He told Walters that the interviews would proceed unless the CIA directed otherwise, in writing. Walters delivered instead a memorandum stating that the CIA had no interest in the matter. The intermediaries were then finally interviewed. Tr. 6142-6144, 6207-6210.

This delay was made possible because some of the conspirators were carefully monitoring the FBI investigation. Beginning on June 21, at Ehrlichman's direction, Dean established a liaison with the FBI. Tr. 2690-2697. He sat in on several FBI interviews, received copies of reports and "lead sheets," and finally obtained a memorandum summarizing the investigation and future FBI plans. This memorandum he showed to Mitchell, Haldeman, and Ehrlichman. Tr. 2690-2697, 2711-2712, 2727-2728, 2830-2837, 6168-6176, 6217-6221, 6661.

Throughout this opinion "Govt. Ex." refers to a Government exhibit at trial. Most of the exhibits referred to here were tape recordings of the conversations of co-conspirators. "Tape Tr." refers to the transcript of tapes included as an appendix on appeal. These transcripts were carefully checked by the trial judge and, once he ruled they were "substantially accurate," they were then given to the jury to serve as listening aids while the jury heard the tapes through headphones. The transcripts themselves were not admitted into evidence, and the jury was repeatedly told that their own interpretation of what they heard on the tapes was to control. Tr. 2850-2855, 6152-6153.

ing all blame on Liddy, who had pledged silence. They would maintain that Liddy was off on a frolic of his own, betraying his position of trust within CRP. Tr. 2762-2763. It still was necessary to explain why this man, general counsel to the Committee, had been supplied with such large sums of money (it proved later to be $199,000) capable of diversion to private frolics. Tr. 2759-2773, 4552-4562, 6652-6660.

Hunt presented an additional problem. He, like Liddy, apparently knew that Gemstone was a project approved at the highest levels of CRP. Like Liddy he had participated earlier in several "seamy things" for the White House, as he once described them. Tr. 3088. For example, as members of the White House Special Investigation Unit,[16] and with the approval of Ehrlichman, who was head of the Unit, they had broken into the office of Daniel Ellsberg's psychiatrist, ransacking the doctor's records.[17] Tr. 7654-7656, 7664-7675. Significantly unlike Liddy, however, Hunt had never pledged to keep his knowledge of these things to himself. Assuring his silence would be extremely costly; he began to demand large cash payments on behalf of himself and the five burglars.

Thus were born the two major parts of the conspiracy: the cover story to explain the frolicsome Liddy's ability to draw so deeply on the CRP treasury, and the payment

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[16] This Unit was nicknamed the "Plumbers" since its mission was to stop leaks of classified information. Tr. 7656.

[17] *See United States* v. *Ehrlichman*, —— U.S.App.D.C. ——, —— F.2d —— (No. 74-1882, decided May 17, 1976); *United States* v. *Barker*, —— U.S.App.D.C. ——, —— F.2d —— (No. 74-1883, decided May 17, 1976); *United States* v. *Liddy*, —— U.S.App.D.C. ——, —— F.2d —— (No. 74-1885, decided May 17, 1976). Ellsberg, at one time a Defense Department official, had been responsible for transmitting the classified Pentagon Papers to the New York Times.

of hush money to those indicted and later convicted for the burglary.

C. *The Cover Story*

Magruder first suggested that CRP officials simply say that the $199,000 had gone to Liddy for security at the Republican nominating convention. He broached this story to a meeting attended by Mitchell, Mardian, LaRue, and Dean. Mardian expressed doubts that it would hold up—the sums seemed too large. Tr. 2759-2763. Thereafter Magruder tried again. He came to a subsequent meeting of the same group with the story that $100,000 was delivered to Liddy for protection of "surrogate speakers" [18] as they traveled around the country in behalf of the Nixon campaign. Only the remainder was meant for convention security. This story met with approval. Tr. 2769-2773, 4552-4562, 5254-5255, 6652-6660. It seemed sufficiently convincing, particularly when Magruder indicated that, at Magruder's urging, the CRP official in charge of the surrogate program would corroborate the story with perjured testimony of his own. Tr. 2769-2770, 4562-4563, 4570, 4697.

Magruder refined the story, reviewed it with Mitchell (who urged him to minimize Mitchell's role in running the campaign), and then rehearsed it with Dean, all in preparation for his appearance before the grand jury on August 16. His delivery of it on that date proved sufficiently persuasive that he escaped indictment—"by the skin of his teeth," according to Dean's intelligence from the investigation. Tr. 2773-2776, 4605-4612. Magruder was recalled before the grand jury in September to explain the January and February meetings that were entered in his calendar, the meetings where Gemstone

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[18] These were high Government officials who bore the major burden of campaign speaking duties, in place of Mr. Nixon. Tr. 2770, 4561.

was first discussed. With the assistance of Mitchell and Dean, however, he had prepared a subsidiary cover story to hide the purposes of these meetings. The first, he told the grand jury, had been cancelled, and the second related solely to the new election law. Tr. 2824-2829, 4612-4616.

Mitchell and Ehrlichman, meantime, were being careful to say nothing that might ruffle the veil the cover story had cast over Gemstone activities. Each denied to FBI agents that he knew anything about the break-in except what he read in the newspapers. Tr. 2820-2824, 5393-5402. Then on September 14 Mitchell told the grand jury that he was not aware of any clandestine CRP intelligence program, nor did he know of Liddy's illegal activities. Tr. 7094-7095. This testimony formed the basis for Mitchell's false declarations conviction under Count 4 of the indictment. 18 U.S.C. § 1623 (1970).

D. *Hush Money*

On June 20 or 21 Liddy met with Mardian and LaRue. He told them the full story concerning the background of the break-in, confessed his own role in the planning and execution, and explained that all those arrested would remain silent. He went on to say, however, that certain "commitments" had been made to provide them with bail, legal fees, and living expenses. LaRue assured him that all commitments would be met. Tr. 6601-6603. Later LaRue and Mardian met with Mitchell, Dean, and Magruder to tell them of Liddy's revelations and to decide how to raise the funds. Mardian suggested that the CIA might be a source (the burglars had prior CIA connections), and Dean was dispatched, after checking with Ehrlichman, to bring the CIA in. Tr. 2728-2735, 6610. He was unsuccesful. At Ehrlichman's insistent urging he tried again, but again was turned down. Tr. 2735-2737, 6132-6142.

With the approval of Haldeman and Ehrlichman, Dean on June 28 turned to another source. He contacted Herbert Kalmbach, a long-time Nixon fund-raiser. Tr. 2740-2742. He told Kalmbach that funds were needed to meet certain CRP commitments to the burglars, and that absolute secrecy was essential. Kalmbach agreed to take on the task. Tr. 2743-2745, 6298-6308. He obtained money from LaRue (money which came from excess cash held at the CRP offices), from the chairman of the Finance Committee to Re-elect the President, CRP's finance arm, and from a private contributor. Tr. 6309-6312, 6326-6345. Before he approached the private contributor, however, he checked with Ehrlichman to be sure that Dean had authority to put this fund-raising in motion. Ehrlichman quieted his doubts and took the occasion to stress the need for confidentiality. If the operation did not remain secret, he warned, "they would have our heads in their laps." [19] Tr. 6328-6332.

To distribute the money Kalmbach employed a courier who devised a complex scheme of leaving the funds in pay telephone booths and airport lockers. He was responsible for delivering $187,000 to the burglars through Hunt's lawyer, Hunt's wife, Hunt himself, and Liddy. All this took place between July 1 and mid-September, when Kalmbach made his final accounting and insisted he did not want to continue. Tr. 4213-4216, 6315-6348, 6350-6356, 6477-6511. Dean and LaRue kept Haldeman, Ehrlichman, and Mitchell posted throughout on the "money problem." Tr. 2751-2754, 6620-6628, 6683-6684.

On September 15 the grand jury handed up indictments against the five burglars, plus Hunt and Liddy. No one else was implicated. Tr. 4221-4222. The initial policy of "containment," as Dean was later to call it, had proven successful. Tr. 2855-2860, 3100.

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[19] Tr. 6331.

The need to channel hush money continued nonetheless. LaRue inherited Kalmbach's role. He delivered $20,000 or $25,000 to Hunt's lawyer immediately, and for a while the demands abated. Tr. 2872, 2907-2908, 6662, 6684-6685. But on November 13, only a few days after Nixon's re-election, Hunt called Colson at his White House office. With a tone of urgency he maintained that the commitments had not been met, and he reminded Colson that loyalty "is a two-way street." Colson taped the full conversation. Tr. 4250-4254, Govt. Ex. 35 B, Tape Tr. 642-658. Dean made a copy of the tape and took it to Camp David, Maryland, the presidential retreat, to play it for Haldeman and Ehrlichman. They agreed that the money was Mitchell's responsibility and dispatched the Hunt tape to New York in the possession of Dean—Dean to play the tape for Mitchell and impress upon him his responsibility. Tr. 2909-2931.

Mitchell did not shoulder it alone. Instead he promptly inquired, through Dean, about the availability of a secret $350,000 fund under Haldeman's control, transferred to the White House from excess CRP funds. Haldeman approved use of part of it to meet the burglars' demands. Tr. 2935-2941, 6687-6692, 6705-6708. Those involved initially expected that the fund would be replenished through LaRue's fund-raising, but that hope soon vanished. It ultimately became necessary to transfer the entire fund to LaRue (all with Haldeman's approval), and by February he had dispensed $167,000. Tr. 3033-3042, 6716-6724, Govt. Ex. 15, Tape Tr. 244-246.

Money was not enough to assure silence. Hunt had decided to plead guilty and wanted a guarantee that his sentence would be short. Colson, his erstwhile friend at the White House, checked with the President and then provided some veiled assurances which Hunt took to mean he would be granted clemency at Christmas 1973. Tr. 2987-2992, 4261-4270. Hunt and four of the burglars

did plead guilty. Liddy and McCord insisted on going to trial, although neither took the stand. They were found guilty, and sentencing was set for March 23, 1973. Tr. 4271. When McCord began to get restless as that date approached (he threatened in a letter to the White House that "all the trees in the forest will tumble" [20]), Mitchell urged that the same veiled assurances of clemency be extended to him. Ehrlichman agreed, and assurances were delivered to McCord—to no avail, it later developed. Tr. 2992-3001, 6518-6520.

E. *The Cover-up Unravels*

The greatest apparent threat to the conspirators' plans lay in the impending hearings of the Senate Select Committee on Presidential Campaign Activities, chaired by Senator Ervin. Dean, Haldeman, and Ehrlichman met at Rancho LaCosta in California in mid-February to plot strategy. They worried most about what the break-in defendants might say before the Committee if granted immunity. Knowing that more demands for money had been made, they decided it was essential that Mitchell meet what they all agreed was *his* responsibility—the providing of funds. A presidential assistant was sent to New York to tell Mitchell the results of the meeting and, once again, to remind him of his responsibility. Tr. 3032-3034.

Hunt demanded another $122,000 on March 16, in order to settle his financial affairs before sentencing. Dean relayed this word to Ehrlichman and, at his suggestion, on to Mitchell. Tr. 3086-3090. But Dean decided he had to speak with the President directly about the dangers inherent in guaranteeing the continued flow of money. On March 21, 1973 Dean thus told Nixon that there was a "cancer" growing on the presidency in the form of the endless hush money demands. He recounted all

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[20] Tr. 2995.

that he knew about the origin of the break-in and the subsequent payment of hush money. He guessed that future demands would come to another million dollars. Nixon replied that "you could get a million dollars. And you could get it in cash. I, I know where it could be gotten." [21] Nixon returned to the Hunt demand several times during the ensuing conversation, and he continued to mention it after Haldeman joined the discussion. Each

[21] Govt. Ex. 12, Tape Tr. 131. This conversation figured in Haldeman's conviction of perjury under Count 8 of the indictment. Haldeman testified before the Senate Select Committee that he had listened to a tape of the Nixon-Dean conversation, that Nixon had in substance made the remark quoted in text, but that Nixon then said "but it would be wrong." The tape of the conversation revealed, however, that many minutes passed and the topic had shifted before Nixon uttered any words to that effect:

PRESIDENT: One problem; you've got a problem here. You have the problem of Hunt and uh, his, uh, his clemency.

DEAN: That's right. And you're going to have the clemency problem for the others. They all would expect to be out and that may put you in a position that's just . . .

PRESIDENT: Right.

DEAN: untenable at some point. You know, the Watergate Hearings just over, Hunt now demanding clemency or he is going to blow. And politically it'd be impossible for, you know, you to do it. You know, after everybody . . .

PRESIDENT: That's right.

DEAN: I am not sure that you will ever be able to deliver on the clemency. It may be just too hot.

PRESIDENT: You can't do it till after the '74 elections, that's for sure. But even then . . .

DEAN: (Clears throat)

PRESIDENT: your point is that even then you couldn't do it.

DEAN: That's right. It may further involve you in a way you shouldn't be involved in this.

PRESIDENT: No it's wrong, that's for sure.

Govt. Ex. 12, Tape Tr. 156.

time he stressed, in the presence of Haldeman and Dean, that Hunt's immediate demands should be "handled" in order to "buy time." Neither Dean nor Haldeman demurred. Tr. 3094-3102, Govt. Ex. 12, Tape Tr. 103, 131, 135-137, 155, 159, 164-167, 189, 196, 205-206.

Haldeman, Ehrlichman, and Dean met later that day to discuss possible strategies. They agreed that Mitchell should step forward and take the full blame, thinking the prosecutors and the Senate Committee would thereby be pacified and would press no further. Tr. 3140-3141.

Mitchell, meanwhile, was meeting his "responsibility." Informed of the Hunt demand by LaRue, he directed LaRue to deliver $75,000 to Hunt's attorney that night. After this delivery Hunt, according to his own testimony at trial, repeatedly perjured himself before the grand jury. Tr. 4276-4290, 6726-6732.

The next day, March 22, Mitchell came to Washington and told the others that the Hunt problem was under control. Tr. 3208-3213, 8589-8590, 10280. Nixon, Dean, Mitchell, Haldeman, and Ehrlichman then took up a discussion that had begun the day before: the best strategy for dealing with the upcoming Senate hearings. Despite the previous day's plans, no one had the fortitude to suggest directly to Mitchell that he take the full blame and go to jail to save the Nixon presidency. Lacking that alternative, they all focused on a plan Nixon had discussed with Dean on March 17—indeed, it had been mentioned as an option for several months. Dean would make a report to the President. It would be quite general and would indicate that no one from the White House was involved. They might deliver it to the Senate Committee, but in any event it would serve as a safeguard for Nixon. Ehrlichman explained that if "some corner of this thing comes unstuck," the President could say he relied on the report.[22] Tr. 3213-3221, Govt. Ex. 16, Tape Tr. 273-287.

[22] Govt. Ex. 16, Tape Tr. 277.

The Dean report was never written, for on March 23 the conspiracy was dealt a heavy blow. McCord, facing sentencing, had written a letter to Judge Sirica breaking the word that the burglar's silence was the result of pressure, that others were involved, and that perjury had been committed. The letter was released to the public at the sentencing hearing that day. Tr. 3253-3254, 3259-3262. Shortly thereafter Magruder, Dean, and LaRue began to talk to the prosecutors. Tr. 3277-3280, 4639-4643, 6732-6733.

Throughout the month of April 1973 Haldeman, Ehrlichman, and Nixon met frequently at the White House trying to decide how to respond to the new developments.[23] They were faced with two primary problems: how to cope with Dean, who plainly knew a great deal, and how to explain the hush money payments—which, they recognized, were now bound to be revealed to the prosecutors and the public. As to the first, after much discussion Nixon asked Ehrlichman to try to bring Dean back on board through veiled assurances of clemency. Govt. Ex. 18, 22, Tape Tr. 389-393, 403-407, 469-476. Dean refused to speak with Ehrlichman, however, and his refusal rekindled the remaining conspirators' interest in a "scenario" laying the blame for all illegality on Dean. Tr. 3306-3307, Govt. Ex. 24, Tape Tr. 500-504. Haldeman, after spending a few hours reviewing the possibilities, reported that this scenario "works out pretty well."[24] It would key on Dean's failure to present the President with the Dean report in late March. Only then, the scenario went, were the President's suspicions fully aroused, and only then did he discover the scope of Dean's involvement. Govt. Ex. 26, Tape Tr. 557-567.

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[23] Admitted into evidence were tapes of 14 conversations during this period involving Nixon and either Ehrlichman or Haldeman or both. Govt. Ex. 18-24, 26-29, 31-33.

[24] Govt. Ex. 26, Tape Tr. 557.

This scenario also dealt tentatively with the second problem—explaining the hush money. They would state that the money was delivered for humanitarian purposes[25]—legal fees and family support—and that their sole motivation was to discourage the defendants from talking to the press; they did not seek to keep them from being candid with the prosecutors. But both Haldeman and Ehrlichman wanted to consult their lawyers before relying too heavily on that version of the story. Govt. Ex. 27, 28, Tape Tr. 570, 573-574.

When Haldeman was called before the Senate Select Committee in late July and early August 1973, he carried out the scenario laying all blame on Dean. He told the Committee that no one at the White House, except Dean, knew that the payments to the burglars were for "hush money" before March of 1973. He said Nixon discussed with Dean on March 21 the possible payment of a million dollars to the burglars, but he insisted that Nixon had followed that up by saying "it would be wrong."[26] And he claimed that there had been no discussion of Magruder's perjury at the March 21 meeting. Tr. 7483-7489, 7518-7519, Govt. Ex. 100. These statements formed the basis for Counts 7, 8, and 9 of the indictment charging Haldeman with perjury. 18 U.S.C. § 1621 (1970). He was convicted on all three counts.

In early May Ehrlichman told the grand jury that he had no recollection of Dean's having told him of Liddy's involvement in the break-in during the first weeks after the burglary. He also testified that he had spoken gen-

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[25] As Nixon expressed it to Ehrlichman on April 14, all those involved have "gotta have a straight damn line that, of course we raised money. Be very honest about it. But, uh, we raised money for a purpose that we thought was perfectly proper." Ehrlichman agreed. Govt. Ex. 22, Tape Tr. 471-472. *See* Govt. Ex. 37, Tape Tr. 664-665.

[26] *See* note 21 *supra*.

erally with Kalmbach about Kalmbach's fund-raising efforts, but he denied all recollection of any mention of the purposes the money was to serve, and he claimed no memory of telling Kalmbach to keep the efforts secret. Tr. 7180-7192. For this testimony he was charged in Counts 11 and 12 with making false material declarations, 18 U.S.C. § 1623 (1970), and the jury found him guilty of both offenses.

Mitchell too, although he had not been privy to most of the April meetings where scenarios were devised, advanced the cover-up through his testimony before the grand jury and the Senate Committee in the spring and summer of 1973. On April 20 he denied before the grand jury any recollection of having been told of Liddy's confession to LaRue and Mardian. Tr. 7158, 7166-7167. Before the Senate Committee in July he claimed not to have heard of Gemstone as of June 19, 1972, and he denied that there was any mention of destroying documents at the meeting he held that evening with Magruder, Mardian, Dean, and LaRue. Tr. 7177-7180. These statements founded Counts 5 and 6 of the indictment, charging false declarations, 18 U.S.C. § 1623 (1970), and perjury, *id.* § 1621, respectively. Mitchell was convicted under each.